No. 82-81

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IN THE

United States Supreme Court

OCTOBER TERM 1982

CABLEVISION SYSTEMS DEVELOPMENT COMPANY and ATLANTIC CABLE TELEVISION SERVICES CORPORATION,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 25

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

Whether an integrated cable television company which had previously subcontracted two of its many services, and which subsequently terminated the subcontracting relationship and hired the subcontractor's employees, can be deemed a successor to the subcontractor, obliging it to bargain with the union that represented the subcontractor's employees, where the integrated cable television company and the subcontractor are in different industries.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CABLEVISION SYSTEMS DEVELOPMENT COMPANY and ATLANTIC CABLE TELEVISION SERVICES CORPORATION,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 25

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Cablevision Systems Development Company and Atlantic Cable Television Services Corporation, pray that a writ of certiorari issue to review the judgment entered in this case on March 2, 1982, by the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals which enforced the order of the National Labor Relations Board is officially reported at 671 F.2d 737 (2nd Cir. 1982) and is printed along with the order denying the petition for rehearing in the Appendix to this petition. For ready reference, both the decision and order of the National Labor Relations Board, and the decision of the Administrative Law Judge which it adopts are printed in the Appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit denied the petition for rehearing on April 19, 1982. This petition is being filed within 90 days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

Statute Involved

The relevant statute is Sec. 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§158(a)(1) and (5), which states:

> Sec. 8(a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Statement of the Case

This case comes to this Court following the enforcement by the Court of Appeals for the Second Circuit of an order of the National Labor Relations Board (Board) rendered on August 27, 1980 which adopted the recommended order of the Administrative Law Judge requiring Petitioners to bargain collectively with Local 25, International Brotherhood of Electrical Workers, AFL-CIO.

The Second Circuit agreed with the Board that Petitioners were a successor to Broadway Maintenance Corporation because a majority of the employees in the bargaining unit at Broadway were employed by Petitioners and performing essentially the same duties.

Statement of the Facts

Cablevision Systems Development Company (Cablevision) operated a fully integrated cable television company when in 1974 it contracted out to the alleged predecessor Broadway Maintenance Corporation (Broadway) the installation and service technician functions. These were just two of the numerous functions performed by a cable television company. Broadway was not a cable television company. Indeed, it refused to undertake all of the functions required to construct and operate a cable television system. It provided to cable television companies on a contracting-out basis these two functions. Practically all the other operations were performed by Cablevision's own employees.

In June of 1977 Cablevision terminated the Broadway contracting-out relationship and brought these functions in-house, altering and revising them so as to integrate them with the overall operations of the company. A subsidiary of Cablevision, Atlantic Cable Television Services Corporation (Atlantic Cable) was organized for the purpose of delivering all engineering services to Cablevision, including the two that had been performed by Broadway on a contracting-out basis. Atlantic Cable operates as the engineering department of Cablevision.

The Proceedings Below

A. The Decision of the National Labor Relations Board

The National Labor Relations Board found that the majority of employees of Atlantic Cable when it commenced operations were former Broadway employees and that they performed the same jobs for Atlantic Cable as they had formerly for Broadway. Accordingly, the National Labor Relations Board found that Atlantic Cable was the successor to Broadway and had the obligation to bargain with the union that had represented Broadway's employees.

B. The Decision of the Court of Appeals

The Court of Appeals enforced the order of the National Labor Relations Board, rejecting Petitioners' argument that they were not a successor because they were in a different industry than the claimed predecessor. It accepted the Board's findings that the majority of the employees in an appropriate bargaining unit within the petitioner Atlantic Cable came over from the predecessor and continued to perform essentially the same duties. This fact, rather than the differences between the companies, was found determinative by the Second Circuit relying upon the statement in *IUE* v. *NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979) that the "essential inquiry is whether operations, as they impinge on union members, remaining essentially the same after the transfer." However, the Court in *IUE* v. *NLRB*, stated immediately preceding the quoted language that "some internal organization alterations may affect successorship obligations," citing *International Ass'n of Machinists* v. *NLRB*, 414 F.2d 1135, 1137, 1138 (D.C. Cir. 1969).

The Second Circuit failed to acknowledge that such basic "differences in the enterprises operated" override the continuation of the same basic tasks after the change as the employees had performed for the predecessor. That failure accounts for the Court's citation of *Saks & Co.* v. *NLRB*, 634 F.2d 681, 686 (2d Cir. 1980) to support the successorship bargaining obligations where a majority of the successor's employees was taken over from the predecessor. In fact, the Court reached that conclusion in *Saks* because the predecessor and successor "are both retail department stores" and therefore "clearly distinguishable from *Bausch & Lomb*", 526 F.2d 817 (2d Cir. 1975), where the firms involved were in "completely different industr[ies]." See *infra*. page 6.

REASONS FOR GRANTING THE WRIT

A serious conflict exists between this decision of the United States Court of Appeals for the Second Circuit and the decision of this Court in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972) and its progeny, with respect to the application of the successorship doctrine to a situation where the claimed successor is in an industry different from the claimed predecessor.

Relying on this Court's decision in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 278-279 (1972), the Second Circuit focused only on the similarity of duties performed by the employees for the predecessor and successor. In doing so, it overlooked the critical successorship requirement emphasized by this Court in *Burns*, that both firms operate in the same industry.

This requirement was not overlooked by the Court of Appeals for the District of Columbia in *International Ass'n of Machinists* v. *NLRB*, *supra*.

In that case the Court noted that automobile dealerships which hired the employees of a discontinued dealership, were not successors because "of differences in the enterprises operated" by the alleged predecessor and successor. There was a lack of identity in the operational aspects of the two companies. It was not argued that there was any change in the duties of the service department employees when they moved from the terminated dealership to the alleged successor automobile dealerships, and the Court therefore noted that the finding of no successorship did *not* turn on the composition of the unit, the consideration found determinative by the Second Circuit in the instant case.

The Court of Appeals for the First Circuit has acknowledged the correctness of *International Ass'n of Machinists* in *NLRB* v. *Middleboro Fire Apparatus, Inc.*, 590 F.2d 4 (1st Cir. 1978). Moreover, the Court of Appeals for the Fifth Circuit

in *NLRB* v. *Alamo White Truck Service*, 273 F.2d 238 (5th Cir. 1959) noted that there is no successorship obligation where the nature of the employing enterprise changes.

Indeed the Second Circuit in the instant case failed to follow its own decision in *NLRB* v. *Bausch & Lomb, Inc.*, 526 F.2d 817 (2d Cir. 1975). There, the Court held that a successorship obligation to bargain would not arise from the employment by a new owner of a building of boiler men who had worked for the previous owner. The Court noted that while all buildings require a heating function—as all integrated cable television companies require the two functions performed by the petitioners' predecessor—"greater continuity of operations" is required for successorship.

It is important that this Court reaffirm the successorship doctrine in order to preclude its application where the claimed successor and predecessor are in different industries. This requirement, formulated by this Court in *Burns*, has been adhered to by other federal courts of appeals and has been followed on a previous occasion by the Second Circuit. There is no reason for the Second Circuit to have abandoned this requirement in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: Mineola, New York
July, 1982

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APPENDIX A

Court of Appeals Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of April, one thousand nine hundred and eighty-two.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

against

CABLEVISION SYSTEMS DEVELOPMENT COMPANY AND ATLANTIC CABLE TELEVISION SERVICES CORPORATION,

Respondents,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 25 [Local 25],

Intervenors.

No. 81-4067

UNITED STATES COURT OF APPEALS
Filed
April 19, 1982
A. Daniel Fusaro, Clerk
Second Circuit

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent, Cablevision Systems Development Company,

Upon consideration by the panel that heard the appeal, it is ORDERED that said petition for rehearing is DENIED.

It is further noted that suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
Clerk
by Francis X. Gindhart
Chief Deputy Clerk

APPENDIX B

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 167—August Term, 1981
(Submitted: October 28, 1981 Decided: March 2, 1982)
Docket No. 81-4067

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

against

CABLEVISION SYSTEMS DEVELOPMENT COMPANY and ATLANTIC CABLE TELEVISION SERVICES CORPORATION

Respondents.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 25 [Local 25],

Intervenors.

Before:

MOORE and NEWMAN, *Circuit Judges*
and GRIESA, **District Judge.*

NLRB sought enforcement of order against employer. The Court of Appeals, *Griesa, J.*, held that employer succeeded to obligation of predecessor employer to bargin with incumbent union, where the change from one employer to another involved the recapture of an operation previously given to a contractor.

*The Honorable Thomas P. Griesa of the United States District Court for the Southern District of New York, sitting by designation.

Enforcement granted.

SANDRA SHANDS ELLIGERS, N.L.R.B., Washington, D.C. (William A. Lubbers, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Acting Associate Gen. Counsel, Elliott Moore, Deputy Associate Gen. Counsel, N.L.R.B., Washington, D.C., of counsel), *for Petitioner.*

WILLIAM H. ENGLANDER, Mineola, New York (Cooper, Englander & Sapir, P.C.), *for Respondent.*

RICHARD S. BROOK, Garden City, New York (Elihu I. Leifer, Robert D. Kurnick, Sherman, Dunn, Cohen, Leifer & Counts, P.C., Washington, D.C.), *for Intervenor, Local 25, International Brotherhood of Electrical Workers, AFL-CIO.*

GRIESA, *District Judge:*

This is an application by the National Labor Relations Board for enforcement of an order issued against Cablevision Systems Development Company and its wholly-owned subsidiary, Atlantic Cable Television Services Corporation. Local 25, International Brotherhood of Electrical Workers, AFL-CIO, has intervened in support of the Board's order. The Board ruled that Cablevision and Atlantic are required to bargain with Local 25. The Board based its ruling on the ground that Cablevision and Atlantic are successors to the obligations of a previous contractor and, alternatively, on the ground that respondents had at one time voluntarily recognized Local 25. We enforce the Board's order on the first ground and deem it necessary to discuss only the issue whether the Board properly applied the so-called "successorship" doctrine.

I.

Cablevision is a partnership engaged in the development,

maintenance and operation of cable television in New York and New Jersey. Prior to July 1, 1977 Cablevision subcontracted certain of its Long Island operations to Broadway Maintenance Corporation. The subcontracted operations were the installation of cables and receiver units at the customers' premises, and the subsequent maintenance of this equipment. The installation and maintenance employees of Broadway were represented by Local 25.

In 1977 Cablevision decided to terminate the contract with Broadway. The contract between Cablevision and Broadway ended June 30. Cablevision formed Atlantic to take over the installation and maintenance operations on Long Island, and Atlantic started business on July 1. Most of the employees of Atlantic when it commenced operation (48 out of 53) were former Broadway employees. The 48 employees performed the same jobs for Atlantic as they had formerly performed for Broadway, although as time passed they were "cross-trained" to perform certain additional duties.

Local 25 sought to bargain with Cablevision and Atlantic on behalf of the Atlantic installation and maintenance employees, as it had done with Broadway. Although discussions were held, Cablevision and Atlantic ultimately took the position that there was no duty to bargain with Local 25, which then filed an unfair labor practice charge with the Board.

The Board (treating Cablevision and Atlantic as one employer) ruled that Cablevision had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1) and (5), by refusing to bargain with Local 25. The Board found that the 53 employees of Atlantic were an appropriate bargaining unit and that Local 25 was their proper representative. In reaching its conclusion the Board determined that Cablevision was a successor employer to Broadway.

II.

Section 8(a)(5) makes it an unfair labor practice for an em-

ployer "to refuse to bargain collectively with the representatives of his employees." An employer who acquires the business of another must, under certain circumstances, recognize and bargain with the union representing the predecessor's employees. Several factors have been mentioned in the cases as warranting the application of this rule, among the most important being that a majority of the employees in the bargaining unit of the successor is carried over from the predecessor and continues to perform essentially the same duties. *Saks & Co.* v. *NLRB*, 634 F.2d 681, 686 (2d Cir. 1980); *see NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 278-79 (1972); *NLRB* v. *Hudson River Aggregates, Inc.*, 639 F.2d 865, 869 (2d Cir. 1981).

It is difficult to imagine a clearer case of the application of the successorship doctrine than the present one, where the change of employer represents merely a recapture of an operation previously performed by an independent contractor. The great bulk of Atlantic's employees was carried over from Broadway, and the former Broadway employees continued to perform basically the same work as before.

In the *Burns* case, *supra*, the Supreme Court applied the successorship rule to a situation where one contractor replaced another contractor. In *Saks*, *supra*, the rule was applied to the recapture of an operation previously performed by a contractor. There, Saks had contracted certain of its alteration work in Pittsburgh to Gimbels. Saks later decided to open its own alteration department, and terminated its arrangement with Gimbels. A majority of the employees in the new Saks operation was taken over from Gimbels and continued to perform the same basic tasks after the change. *See also NLRB* v. *Middleboro Fire Apparatus, Inc.*, 590 F.2d 4 (1st Cir. 1978) (contractor successor to a principal).

Cablevision seeks to distinguish *Burns* and *Saks* on the ground that in those cases the predecessor and successor employers were in the same business (*i.e.*, Saks and Gimbels were retail department stores) whereas, in the present case, the over-

all business of Cablevision is quite different from that of Broadway. However, the relevant comparison is not between Cablevision and Broadway on a total basis, but between the specific operations involving the union members. The "essential inquiry is whether operations, as they impinge on union members, remain essentially the same after the transfer" to the new employer. *IUEW* v. *NLRB* 604 F.2d 689, 694 (D.C. Cir. 1979); *NLRB* v. *Hudson River Aggregates, Inc., supra* at 869.

In the present case the operation, insofar as it affects the union members, is the installation and maintenance of Cablevision equipment on Long Island. This operation was essentially the same after Cablevision took it over as it had been under Broadway.

We grant the Board's petition for enforcement of its order.

APPENDIX C

National Labor Relations Board Order and Decision

251 NLRB No. 176

FPT
D—6880
Hicksville, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CABLEVISION SYSTEMS DEVELOPMENT COMPANY, A PARTNERSHIP

and

Case 29—CA—5811

LOCAL 25, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL—CIO

ATLANTIC CABLE TELEVISION SERVICES CORPORATION

and

Case 29—CA—5812

LOCAL 25, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL—CIO

DECISION AND ORDER

On April 15, 1980, Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief, and the Charging Party filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondents Cablevision Systems Development Company and Atlantic Cable Television Services Corporation, Hicksville, New York, their partners, officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. August 27, 1980

John H. Fanning,	Chairman
John A. Penello,	Member
John C. Truesdale,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[1]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Respondents have requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2]In sec. II, E, of his Decision the Administrative Law Judge inadvertently refers to July 14, 1977, as the date that Respondents withdrew recognition from the Union and refused to bargain. As he found elsewhere the correct date is June 24, 1977.

APPENDIX D

Administrative Law Judge's Decision

JD-(NY)-13-80
Hicksville, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CABLEVISION SYSTEMS DEVELOPMENT COMPANY, A PARTNERSHIP[1]

and Case No. 29-CA-5811

LOCAL 25, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

ATLANTIC CABLE TELEVISION SERVICES CORPORATION

and Case No. 29-CA-5812

LOCAL 25, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Steven Davis, Esq., of Brooklyn, New York for the General Counsel.

William H. Englander, Esq. (Cooper & Englander), of Mineola, New York for Respondent.

Richard Brook, Esq. (Delson & Gordon), for the Charging Party.

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[1]The unopposed post-hearing motion of the General Counsel to amend the complaint with respect to the name of the Respondent, is granted.

DECISION

Statement of the Case

JULIUS COHN, Administrative Law Judge: This case was tried at Brooklyn, New York, on December 18 and 19, 1978 and March 5 through March 9, 1979. Upon charges filed and served on August 4, 1977 in Cases Nos. 29-CA-5811 and 5812, the Regional Director for Region 29 issued a consolidated complaint on August 24, 1978, alleging that Cablevision Systems Development Company, a partnership, herein sometimes called Cablevision, and Atlantic Cablevision Services Corporation, herein sometimes called Atlantic, collectively called Respondent, violated Section 8(a)(1) and (5) by refusing to bargain with Local 25, International Brotherhood of Electrical Workers, AFL-CIO, herein called the Union or Local 25, as the collective bargaining-representative of certain employees of Atlantic in an alleged appropriate unit. Respondent filed an answer denying the commission of unfair labor practices. The principal issues are whether Respondent is obliged to bargain with the Union as a successor employer, and because it recognized the union and unlawfully withdrew such recognition.

All Parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. All parties submitted briefs which have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Cablevision is a partnership comprising general partners, Charles F. Dolan and Communications Management Corp., and certain limited partners. It has been engaged in the development, maintenance and operation of community television an-

tenna systems in New York and New Jersey. Atlantic, a New York corporation, and a wholly owned subsidiary of Cablevision, has a principal office in Hicksville, New York and has been engaged also in the development, maintenance and operation of community television antenna systems in New York and New Jersey. During the calendar year preceding the issuance of the complaint, Cablevision and Atlantic each had gross revenues in excess of $500,000, and both purchased goods and materials in excess of $50,000 of which goods and materials in excess of $50,000 were transported and delivered to their places of business directly from States in the United States other than the State of New York. The complaint alleges, and Respondent admits, that Atlantic and Cablevision constitute a single integrated business enterprise for which a common labor policy is administered by its owners and directors and that both Cablevision and Atlantic are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

II. The Labor Organization

The Union is a labor organization within the meaning of Section 2(5) of the Act.

A. *Background*

Respondent operates a fully integrated system of cable television on Long Island. Among other things, this involves the production of programs which are transmitted through cables erected on utility poles to the homes of its customers. Programs are received on their television sets after Respondent connects a receiver by a line drawn from the nearest utility pole. In 1974 a predecessor of Respondent, (Sterling), subcontracted two of the functions involved in the operation of the system to Broadway Maintenance Corporation. These were the installation of the receiver units in the homes of the customers including the connection from the cable on the utility pole to the television set, and the maintenance and service of these units thereafter as well as the lines on the utility poles. These operations were performed by employees classified respectively as installers and

service technicians. This subcontract with Broadway was kept into effect until the end of 1976 when Respondent began to have some doubts as to continuing the relationship because of its belief that Broadway was not performing to standard as well as some question as to Broadway's financial ability to carry on. It was determined to continue the relationship on a month-to-month basis, but in mid-1977 Respondent decided to terminate the contract by the end of June and take over the functions performed by Broadway.

The employees of Broadway who performed the work of installation and service for Respondent, were represented by Local 25 under two contracts the Union had with Broadway.

During the relevant periods herein, Respondent, through a predecessor corporation, had a contract with Local 3, International Brotherhood of Electrical Workers which was effective from April 1, 1975 through March 31, 1978. It is clear that this collective-bargaining-agreement covered no employees and was not enforced in any respect since the subcontracting to Broadway.

In the spring of 1977, Cablevision formed Atlantic as a wholly owned subsidiary to perform eventually the operating and servicing functions of the system. Thus, Atlantic was in place as an entity to employ those people who would do the installing and the servicing functions being performed by Broadway when the relationship with it was terminated.

B. *Facts*

Richard Segall, assistant business manager of Local 25 testified that in addition to its collective-bargaining-agreement covering the service and maintenance of the systems, the Union had a contract with Broadway for construction which related to actually running the cable from the head end to the utility poles and then from pole to pole and street to street.

Segall stated that early in 1977 he received a telephone call from Irwin Polinsky, general manager of Respondent's Long

Island operations, who informed him Respondent was having problems with Broadway and wanted to discuss them with him. Polinsky told him they were renewing Broadway's contract only on a month-to-month basis and were concerned with Broadway's financial instability. In addition, Polinsky said that Respondent's intention was to expand the area and it wanted to use all the Broadway employees in the event of a cancellation of the contract with Broadway and a takeover by Respondent of the functions performed by it. He indicated he wanted to talk to Segall about a contract.

In his testimony, Polinsky indicated that the contacts he had with Segall were initiated by the latter who himself was concerned with the situation at Broadway. Polinsky also stated he reminded Segall of the existence of Respondent's collective-bargaining-agreement with Local 3 upon which they could fall back in the event the relationship with Broadway was terminated. Polinsky also pointed out to Segall that, if necessary, there were other sources from which Respondent could obtain employees to do this work besides Broadway. Although Polinsky infers Respondent was not necessarily that interested or bound to obtain employees of Broadway, I find to the contrary based on its actions in that regard as detailed at a later point. It became clear that Respondent desperately required the services of the Broadway employees to continue the operation when the subcontract was terminated as of the end of June 1977.

Preliminary to any bargaining, the parties met at the office of Local 3. Present at this meeting were Segall, John Tatta, general manager of Cablevision and president of Atlantic and James O'Hara, assistant business manager of Local 3.[2] While there is some confusion in the testimony of the participants as to the date of this meeting, O'Hara stated that it was on June 1, 1977 and that will suffice for our purposes. The apparent reason for this meeting was that in the course of prior conversations with

[2]O'Hara and Tatta were old friends from the days when the latter was an active member of Local 3. Thereafter, while holding executive positions in other cable television companies in New York, Tatta negotiated many collective-bargaining-agreements with O'Hara.

Segall over the years, whenever Segall had expressed an interest in representing employees of Respondent or its predecessor, Tatta had always maintained that he had a contract with Local 3. The meeting was set up so that this matter of jurisdiction could be straightened out to Tatta's satisfaction. At this meeting O'Hara assured Tatta that Local 25 had jurisdiction over Long Island and that he would not raise the Local 3 contract to prevent any agreement between Local 25 and Respondent.

Segall and Tatta were discussing a contract to cover the installers and technicians working on Cablevision customers but at that point still employed by Broadway. Although it is true, as contended by Tatta, that at the time they could not be sure which of the Broadway employees would come over to Respondent, nevertheless, the understanding was that Respondent would employ these people and Segall would make every effort to induce them to work for Cablevision. The point of dispute concerning this meeting was that Tatta testified he informed Segall and O'Hara there would have to be certain ground rules for contract negotiations. Firstly, he only had a certain amount of money with which to operate and the agreements would have to reflect that situation. Principally, he stated an agreement would have to be reached by June 24 so that he would have an economic package in place to offer Broadway people who would be willing to work for Respondent, and therefore negotiations must be concluded by that date. Further Tatta testified he told them it had to be understood that if an agreement could not be reached by that date, Segall would go away and leave Respondent alone to operate under the Local 3 contract. Both Segall and O'Hara deny any such dealine was set, nor were they even told about it, or that Local 25 would "disappear" if no agreement was reached.

Another meeting was held among the above three participants, this time at Respondent's office in the presence of Polinsky, who testified he requested this meeting so that he himself could hear Segall agree to the conditions imposed by Tatta. Again O'Hara testified that neither Tatta or Polinsky told him if no agreement was reached with Local 25, the latter would

disappear. I credit the versions of Segall and O'Hara because in the particular circumstances, it appears inconceivable that Segall would agree to "disappear" from negotiations concerning a group of employees already represented by Local 25, and further when it was clear that Local 25 and not Local 3 had geographical jurisdiction pursuant to the mandate of their International. I also note that O'Hara testified as he did despite his apparent long standing friendship and cordial relation with Tatta.

In any event the parties had agreed to commence bargaining which they did on June 20. Segall and Polinsky met and using the Broadway contract still in effect with Local 25, began discussing it section by section. According to Segall, Polinsky stressed the financial problems of the Company. Segall told Polinsky that inasmuch as they would have to run through the whole contract from beginning to the end, he believed they should go into formal negotiations and he would bring in at least one employee member to sit in on the talks.

Polinsky and Segall met again on June 22 at which time William Quinn, chief engineer of Respondent's Long Island operations and then president of Atlantic, and Steven Meyer, an employee member of the Union, were present at the meeting. Respondent submitted a formal proposal containing salary figures and also a welfare plan. At this point, Segall noticed for the first time the name of Atlantic, and when he asked about it, Polinsky informed him that was the company he would be doing business with. Segall told Polinsky it was the custom of the Union in the cable TV industry to do business with the company who held the franchise, that the Union had a franchise type contract, and if it were dealing with a subcontractor, another form of contract. Polinsky kept insisting that Atlantic was part of Cablevision and that Segall would have nothing to worry about.

They met again the following day on June 23 and went over fringe benefits and the proposals and counterproposals on wages. During the course of this meeting Polinsky told Segall that neg-

otiations would have to be concluded by 5 p.m. the next day. Segall states he protested that they may not be able to do this as there were so many things in which they may become bogged down, and it was difficult to negotiate under a gun. This meeting which commenced around 10 a.m. ran until 11 p.m. during which all areas of the contract were discussed.

On Friday, June 24th, the same people met again at Respondent's office. The testimony of Segall and Polinsky is to the effect that substantial progress had been made on a complete economic package for the contract. Indeed, Polinsky stated that at about 7 p.m. that evening, (well beyond the 5 p.m. deadline allegedly set by Tatta and Polinsky), he called Tatta and told him he believed there was an agreement on an economic package and all that remained was to work out the boiler plate.

However, at this point, the parties came to the provision in the Broadway contract concerning the right of the Union to visit with the employees at the premises. Polinsky claimed that in his experience this right was never set forth in the contract although he conceded there should not be any problem of a Union agent coming in and speaking to employees. Nevertheless, he refused to incorporate a contract provision giving the Union the absolute right to come in without telling him. If the Union wanted such a provision, he insisted upon prior written notice to the Company. Segall protested that this created an impossible situation because a problem may arise requiring immediate attention and he proposed to undertake to make telephone calls before he visited the site. Polinsky also protested against a provision contained in the Broadway contract granting the Union the right to render assistance to other unions by taking some of Respondent's employees in the event of some labor problem. Segall suggested that this item might not be legal, that the matter should be left to the attorneys, and it was dropped at that point. However the question of visitation remained and Polinsky was adamant about requiring written notification.

At this point Segall told Polinsky it appeared for the first time that he did not want a union and that perhaps there would be

no sense in continuing the discussions. Polinsky then got up and left the room. Within a short time, Polinsky not having returned, Segall left, leaving Quinn and Meyer sitting there. As this apparently was the end of the meeting, Meyer asked Quinn if jobs were still available and specifically asked him if the wage would be on the basis of the last offer made by Respondent, with or without union representation. Quinn said that this was a firm offer and Meyer told him he would really be willing to come over and take a job.

The meeting ended at about 8:30 p.m. Polinsky immediately called Tatta, informed him as to what had occurred, that they had to be operating by July 1, and they just had to move ahead without Local 25 or Local 3. Tatta testified that Polinsky actually stated they should go ahead and do it non-union, screw Local 25 and Local 3, to which Tatta agreed. The following day, Tatta received a telephone call from Dolan, principal partner of Respondent, who said he had run into Segall complaining about Polinsky's tactics, and gave him Tatta's house phone number. When Segall called to say that Polinsky had unreasonably broke up the negotiations, Tatta merely replied that he is in charge and Segall should call him. Segall then called Polinsky who refused to resume negotiations as there was no more time to talk. Tatta testified that Polinsky reported he had told Segall that the rules under which they were working were violated, he was no longer willing to sit down to negotiate, and was going to proceed non-union.

While negotiations had been going on, Respondent was receiving reports from its supervisors that the Broadway employees were very concerned about their continued employment with Broadway when the subcontract was terminated, and were inquiring of Respondent's supervisors with regard to employment with it. Thus, when the negotiations broke up on the evening of June 24, Polinsky proceeded with plans to contact the Broadway people and inform them that jobs would be available and directed Quinn to implement them.

This resulted in a meeting set up for Sunday morning, June

26 at Atlantic's warehouse. In the interim, Segall also encouraged Broadway employees to protect themselves by seeking jobs with Respondent with or without a union contract. About 30 or 40 people, almost entirely Broadway employees showed up. Respondent distributed copies of the economic proposals that had been worked out with Segall and told them that this would be the package. Some of the Broadway employees immediately filled out applications and others took time to consider. Respondent offered inducement to the Broadway people such as seniority for layoff purposes until July 10 so that they would have precedence over new employees who had not worked for Broadway. Operations commenced on July 1.

In the meantime Segall had communicated with O'Hara of Local 3 and met with him and Tatta on July 1 at which Tatta agreed to meet again with Segall on July 8.

Segall, Tatta and Polinsky met on July 8. Prior to this, Polinsky had obtained a copy of a contract between Local 25 and Teleprompter, a competitor on Long Island of Respondent. Apparently the wage rates in the Teleprompter contract were lower than those offered by Segall to Respondent and Tatta stated that he was incensed. Segall attempted to explain that Teleprompter was the holder of the franchise, whereas Broadway and, it appeared to him, Atlantic, were subcontractors and the Union had different contracts for these different entities. Throughout the negotiations it appeared difficult for Segall to understand or agree that Cablevision and Atlantic were to all intents and purposes one and the same, as he was told by Polinsky. At the hearing, Segall explained that during the course of all the negotiations, he had in mind a certain group of employees who were in the service, maintenance, and a portion in the construction departments of Broadway who were servicing Respondent and its customers.

Tatta and Polinsky testified that at this brief meeting on July 8, Tatta said that he would start bargaining from the Teleprompter contract, but Segal replied this was impossible because he could not get the men to take less than what had already been tenta-

tively agreed with Polinsky and, indeed, were being paid by Respondent since July 1. Segall claimed that he had been deceived by Polinsky because he thought he was dealing with Atlantic as a subcontractor and that was why he had not been able to offer the Teleprompter contract. According to Tatta, Segall said that he wanted a contract signed with the terms and conditions agreed upon by Polinsky which he would then put away and not enforce until Respondent told him he could. Segall of course denied this stating he was informed by Respondent it would sign a contract for Cablevision if he were willing to lay off Atlantic. He replied that he could not do that because most of his men were working for Atlantic. He would have signed a contract with Cablevision provided it covered the employees who had worked for Broadway. The meeting then broke up. Whichever of these versions is true, it establishes that the parties were still negotiating as of this date. Segall said that on July 12th he had a call from Polinsky who told him all bets were off and that he could do whatever he had to do. The Union then sent telegrams to Respondent demanding bargaining but Respondent, by its attorney, denied any duty to bargain and recommended that the Union seek a Board election.

The parties were able to stipulate that as of on or about July 1, 1977, there were 45 installers, service technicians and construction employees including 3 installation foremen (whom Respondent contends are supervisors within the meaning of the Act), who came over to work for Respondent from Broadway, and, in addition, 3 head end technicians were transferred by Cablevision to Atlantic on July 1 whom the parties agreed belong in the appropriate unit, plus 2 other installers, making a total of 53 employees. Of these, 48, including the 3 foremen in dispute, were member of the Union.[8]

[8]Respondent, contending that the classifications referred to in this group do not constitute an appropriate unit, would not stipulate that the 53 employees (including the 3 foremen in dispute), comprise the total number of employees in an appropriate unit. However, absent other evidence in the record, I find that the 53 employees referred to above compose the employees employed by Respondent on July 1 in the classifications contended by the General Counsel to constitute an appropriate unit.

C. *The Appropriate Unit*

The complaint as amended, seeks a unit of "all technicians, head end technicians,[4] technician foremen, installation employees, installation foremen, construction employees, and construction foremen." At the hearing the parties further agreed to the addition of another classification of laboratory and converter repair technicians.[5] Except for the foremen, whom Respondent would exclude, it has no quarrel with the inclusion of these classifications in the unit. Respondent does contend however, that having subcontracted to Broadway work performed by employees in these classifications (except head end), and having now brought them back in house, the appropriate unit should now be greatly widened to include other classifications of employees employed by Cablevision.

In considering the divergent views on the issue of appropriate unit, it must be borne in mind that the employees sought to be represented by the Union, constitute a homogeneous group of installers and maintenance people who possess similar skills, although obviously some classifications require a greater degree of expertise than others, and that almost all were represented by the Union pursuant to two collective bargaining agreements with Broadway. Also applicable is the general principle that the unit sought must merely be appropriate and not necessarily the most appropriate.

The Foreman

Respondent would exclude six foremen, three from the installer classification and three from the technicians. The overall

[4]As previously noted, the head end technicians of whom there were 3, were Cablevision employees, transferred to Atlantic on July 1 and agreed by the General Counsel to be appropriately included. This was the only classification not previously employed by Broadway.

[5]The two employees in this classification had been employed by Broadway and came over to Atlantic as of July 1, and had been included by the General Counsel as service technicians. Thus, the addition of this classification title made no change to the complement of Broadway employees who came over to Respondent.

supervisor of the installers was Tony Clarkson and Charlie King for the service technicians. The six foremen in question each had a group of approximately eight to nine employees under them. The foremen wore white shirts and employees blue, all had the insignia of the company on the shirt. All six foremen were represented by the Union and were Union members under the Broadway collective bargaining agreement. Although the foremen were hourly paid, one foreman in each section additionally received a weekly stipend of $40 while the other 4 foremen received $30. The foremen worked with tools at least 30 percent of the time, on most occasions assisting the employees with their work. The foremen checked the quality and quantity of work performed by the employees assigned to them, and could and did tell them to redo work improperly performed when necessary. With respect to these matters the foremen reported the situations to the supervisors, Clarkson or King as the case may be.

Although Respondent's principal witness in these matters, William Quinn, testified that the foremen meted out discipline, it appeared that these were only oral and indeed, Quinn had no recollection of specific instances of discipline imposed by the foremen. Respondent contends that the foremen assign work, but it appears that written work assignment for employees are made out by office personnel who give a batch of them to each foreman, who turns them over to the employee named. Although Respondent introduced in evidence two instances of recommendations by foreman Karwowski, one for promotion and another for termination of an employee, both recommendations were submitted long after July 1, 1977 which was the time of the commencement of the operation. However it does not appear that these recommendations involved the exercise of independent judgment by Karwowski. For example, he recommended that an employee be terminated for having been late three times. This is only an instance of relating a fact to the supervisor from which the latter can determine whether or not to terminate the employee. In sum, as it appears that the assignment of work is merely performed by the foremen as a conduit of work orders made up by office personnel; that there is no evidence as to the

ultimate affect of their so called oral reprimands, nor indeed evidence that such reprimands had been rendered; that part of the day the foremen do the same type of work as do the unit employees; that it does not appear that directions given to employees are other than routine and do not require the use or the exercise of independent judgment; I find that the foremen act in effect as leadmen and do not possess or exercise the indicia of authority required by the Act. Accordingly the foremen are not supervisors and are appropriately included in the unit herein. In this connection, it is further noted that during the course of the bargaining described above, Polinsky admits having bargained for them and at one point stated, during his review of the bargaining results up to that time, that agreement had not been reached yet on wages for foremen.[6]

Dispatchers

There are four dispatchers who work out of Cablevision's building. Several times a day they visit the Atlantic premises, obtain a list of jobs or service calls from a service tech foreman, return to Cablevision and then are in radio communication with the service techs transmitting the service calls to them. In addition, they give work information to service clericals to be checked. Dispatchers do not wear uniforms, do not, except on rare occasions, go into the field, have no contact with the technicians other than by telephone or radio, nor do they work with tools as do the technicians. I find that the dispatchers should therefore be excluded from the unit, as they have no community of interest with service techs or installers.

Telephone Service Reps

The telephone service reps, as do the dispatchers, work at the Cablevision premises under the supervision of Charlie King who also supervises the service techs. The service phone reps receive telephone calls from subscribers who have problems and believe they need service for their equipment. If the problem cannot be

[6] *John Cuneo of Oklahoma, Inc.*, 238 NLRB No. 200 (1978).

resolved on the telephone, the service phone rep communicates with the service techs in the field who will handle the matter by calling upon the customer. Respondent would link these telephone answering employees with the service techs because they seek to solve the subscribers' problem on the telephone and thereby avoid the necessity for a service tech to call upon the customer. However, the fact that the telephone service rep is trained to ask the caller a series of prepared questions such as whether his set is hooked to the cable, does not align these employees with the service techs who are field employees, physically capable of climbing telephone poles and beyond that, work with the tools of the trade. I find insufficient community of interest between the telephone service reps who are office clericals and the service techs and would exclude the former from the unit to be found appropriate herein.[7]

The Business Office Representatives

According to Tatta, business office representatives take calls from customers who desire installation. They obtain all the information from the prospective customer, then make up a work order which is turned over to the supervisor of installers. Although the business office representative is trained and is knowledgeable concerning the function of installing converters and the like, they actually do not make such installations, do not use tools or do manual work. As Tatta explained, they just talk to the customers on the telephone. Business office representatives have little or no contact with installers nor do they work in the field or wear uniforms as do the installers. Moreover there is quite a disparity in wage rates. In the circumstances, I find that the business office representatives are office clerical employees having no community of interest with the installers or service technicians and accordingly I shall exclude them from the unit herein.

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[7] *National Telephone Co.*, 21[illegible] NLRB 634, relied upon by Respondent is inapposite. In that case, the so-called customers service representative, actually made periodic visits to customers and performed minor repairs on the equipment.

Property Damage Employees

The property damage employee was placed in the installation department as his work arises from damage to customers' property or premises usually caused by installation. The employee in question, currently Frank Greco, would then go to the customers premises and make the necessary repairs. Respondent would include this employee in the unit as a separate category. The General Counsel has no objection inasmuch as Greco's name is listed as a service technician who came over on July 1 to Respondent from Broadway. As Greco is a field employee, constantly working with installers and technicians, and is himself a mechanic, and there being no objection to his inclusion, I find that the property damage employee should properly be included in the unit found appropriate herein.

Service Clerical and Installation Clerical Employees

Respondent would include, as the service department clerical, one employee named Mary Jane Migliore. She was employed on July 7, 1977 as a clerical for the service department, producing daily production records for that department, such as making lists of service calls completed and how many problems were resolved on each call. Migliore worked on the premises of Atlantic, and in addition, kept time sheets for the service techs who would verify them and return it to her. It appears that Migliore performs routine clerical duties, does not work in the field or in any manner use tools, and I shall therefore exclude her from the unit as an office clerical employee.

Respondent would also include, and the General Counsel exclude two installation clericals who took care of production records of the installation department. They also work at Atlantic premises and communicate occasionally by radio with the installers and if necessary will give him more work. As with the service clerical, the installation clerical also do routine clerical work, keeping records on the number of completed installations,

of those not completed, and in general a record of all work performed in the installation department. As with the others, the installation clericals do not work in the field and have no contact other than routine telephone or radio communication with installers, and I shall exclude them from the unit found appropriate herein.

The Audit Group

The audit group, consisting of three employees, make runs through the system to be sure there are no illegal connections and that customers who are only basic subscribers, are not receiving more than they paid for. In doing this they are in the field, climb telephone poles to inspect the installations, and spend at least 5 or 6 hours of an 8 hour day doing the field work and the balance filling out reports. However, as part of their work which is essentially security in nature, they would check to see whether installation or technician employees were involved in making unlawful connections. It is clear that in such capacity they would have a conflict of interest vis-à-vis the other employees in the unit, and accordingly I shall exclude the audit group from the unit found appropriate herein.[8]

Warehouse Employees

There are five warehouse employees who are responsible for dispensing material and storaging equipment. The warehousemen who are low paid employees, spend about 65% of their time organizing and dispensing materials to installers, technicians and construction employees. The rest of the time is spent with office supplies, restocking supplies and off loading trucks as necessary. They do not go into the field. These employees were specifically excluded under the Broadway contract with

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[8]In any case, only one of the three audit employees was transferred to Atlantic as of July 1, 1977. The other two remained on Cablevision payroll and were not transferred until a considerable period of time after the approximate July 1, 1977 date, which is crucial to a determination of the Union's support in the unit.

Local 25, are not sought by the Union and, as clearly, the unit would be appropriate without their inclusion, I shall therefore exclude the warehouse employees from the unit herein.

Programming Employees

Respondent seeks inclusion of seven particular programming employees who are employed by Cablevision and have never been transferred to Atlantic. The programming department is in charge of the studio, of news organization, community relations, acquiring outside programming, and also production, such as putting on hockey games. They work inside the studio and do not work in the field. They have little or no contact with the installers, service techs and construction employees and I shall exclude them from the unit found appropriate herein.

At the hearing Respondent also contended that certain employees in its New Jersey subsidiaries would also belong in an appropriate unit. As these employees work in an area quite distant from those sought by the Union herein and have little or no contact with one another, I shall exclude New Jersey employees from the unit found appropriate herein. Not only do the New Jersey employees work in a different area, but they also have separate supervision and there is no significant interchange or transfer of New Jersey employees with Long Island employees.

On the basis of the foregoing, I find the following to be an appropriate unit: "All technicians, head end technicians, technician foremen, installation employees, installation foremen, construction employees, construction foremen, laboratory and converter repair technicians, and property damage employees employed by Atlantic at its Hicksville, New York location, exclusive of all managerial employees, business office clerical employees, service representatives, programming employees, warehousemen, guards and all supervisors as defined in the Act." I further find and conclude that the foregoing constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

I have previously found that as of July 1, 1977, there were 53 employees in the classifications described in the appropriate unit above. The property damage employee was included in the 53 as a technician. An overwhelming proportion of the 53 employees were people who came over from Broadway to commence employment with Atlantic. Moreover, of the 53, 48 were members of the Union as of July 1. It is clear therefore that the Union as of that date represented a majority of the employees found to be in the appropriate unit.

D. *The Successorship Issue*

The general Counsel contends that Respondent is the successor to the installation and service departments maintained by Broadway and as such is obligated to recognize and bargain with the Union as the collective bargaining representative of the employees in those categories. It is well settled that an employer who acquires a business or enterprise of another, operates it with little or no change, and hires a sufficient number of the employees of its predecessor so that they constitute a majority of his own employees, is obligated to recognize and bargain with the collective bargaining representative of the employees whom he has just hired.[9]

I find in the circumstances as set forth above, Respondent became the successor of the installation and service department of Broadway on July 1, when it commenced the operation of such departments by hiring a number of employees at Atlantic of whom the vast majority had been employed by Broadway and had been represented by the Union herein. Actually the only difference between the situation with which we are confronted herein and the classic successorship case is in the fact that Respondent was not a purchaser of the business but rather terminated a subcontracting relationship with the predecessor and took those functions in-house. Even this is not totally true since Respondent concededly did purchase a certain amount of equip-

[9] *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

ment and vehicles from Broadway when it terminated the subcontracting relationship.

In any case, it is not necessary that a bona fide purchase arrangement be found in order to establish the successorship doctrine. Purchasing a business is not required at all. Thus, in *G. T. & E. Data Services Corp.*, 194 NLRB 719 (1971), a corporation formed another corporation to take over the data processing work of the parent company, and in effect transferred employees to it who thereupon proceeded to do the same work using the same equipment. The Board stated in that case: "In defining and applying the 'employing industry' concepts, the Board, with court approval, has always found that more significant weight should be attached to facts demonstrative of 'the continued nature of the employment (of a particular group of employees involved) rather than to the source of such employment'. The Board therefore held that where an allegedly 'new' employer takes over a portion of the operation of a predecessor enterprise, and continues these operations without hiatus, and with substantially the same employees, it is, as a matter of industrial reality, the 'successor employer' of the employees involved." In the instant case, Respondent has recaptured from its subcontractor the functions of installation and servicing of its cable television business. There was no hiatus whatsoever, as the subcontract was terminated on June 30 and Respondent immediately began business on July 1. The employees taken over from Broadway continued to do the same work that they had been doing before, and were supervised by the same supervisors.

There is no question that the Union was the collective bargaining representative of the installation and technical employees, a fact clearly known to Respondent. While there are some slight changes or additions to the unit from the units described in the Union's contracts with Broadway, the changes were basically cosmetic and agreed upon by the parties herein.

I find no merit to Respondent's contention that the employees taken over from Broadway were cross-trained to perform a greater variety of work than they did at Broadway, which mili-

tates against a finding of successorship. Actually the record reveals that at the inception of their employment with Atlantic, July 1 and shortly thereafter, these employees performed exactly the same work and continued their duties as they did with Broadway without any change. Indeed, it is clear from the record that Respondent was only too happy to have them for otherwise they would have been unable to properly service their existing customers or begin service with new ones. The fact that thereafter Respondent's supervisors began giving these employees additional training does not change the result as it is clear that the additional duties were not essentially different or required a greater knowledge or different skills.

Having found that Respondent was a successor to Broadway as described above, I further find that Respondent, as of July 1, 1977, was obligated to recognize and bargain with the Union as the collective bargaining representative in the unit found appropriate herein.[10]

E. The Alleged Recognition and Unlawful Withdrawal of Recognition

The General Counsel alleges that Respondent conferred recognition upon the Union in mid-June 1977 and then unlawfully withdrew recognition on June 24 during negotiations. It thereafter met again with the Union and finally refused to bargain after July 8.

The thrust of Respondent's contention concerning recognition and withdrawal of recognition lies in what it characterizes as the pre-hire nature of the meetings and negotiations. It points out that all discussions with the Union occurred from mid-June until June 24, all prior to its hiring any of the Broadway or other employees for Atlantic. Respondent asserts it had no idea then whether any Broadway employees could actually come to work for it and it was also seeking employees from competitors

[10] *N.L.R.B.* v. *Middleboro Fire Apparatus*, 590 F.2d 4 (C.A. 1, 1978); 100 LRRM 2182.

where the employees would have similar experience. However, the negotiations which occurred up to June 24, looking to a contract with the Union, were not of the type frowned upon by the Board as unlawful pre-hire contracts. The latter involve situations in which an employer has no employees nor is there a group or pool of employees in existence with reference to whom the parties are bargaining. That is not the case herein. At all times, and I so find, Respondent was interested in obtaining as many of the Broadway employees working in the appropriate unit at Broadway, as would agree to come over and work for it on July 1. Actually Respondent had no alternative because despite its protestations that it was willing and anxious to hire experienced installers and technicians from anywhere, there is no evidence in this record that it was able to hire on July 1, employees other than those that come from Broadway plus a few which had transferred from its own Cablevision payroll. Moreover, the Board has held that the "pre-hire" nature of negotiations are not objectionable where a successorship is found and when the employees had already selected a bargaining representative at its previous employer.[11]

Finally, the Supreme Court took cognizance of these situations in Burns in which it stated that it would be appropriate for a new employer who plans to retain all the employees in the predecessor's unit, to initially consult with the employees' bargaining representative.[12] I find that Respondent's alleged uncertainty as to the identity of the complement it was seeking is an afterthought, as it was perfectly clear that Respondent desired and indeed was anxious to hire the Broadway employees. Moreover, by its conduct in engaging in extensive negotiations with the Union, it extended recognition. Specific words to that effect are not needed.[13]

In sum I find that Respondent extended recognition to the Union by meeting with it and engaging in meaningful collective-

[11]*General Electric Company*, 173 NLRB 511, 513.

[12]*Burns, supra* at 295.

[13]See *Broadmoor Lumber Company*, 227 NLRB 1123 (1977).

bargaining negotiations as more fully described above. Inasmuch as the Union represented a vast majority of the employees who commenced working on July 1 at Atlantic, Respondent's withdrawal of recognition and its refusal to bargain between July 24 and July 1 constituted a violation of Section 8(a)(5) of the Act. Respondent does not contend that negotiations reached an impasse on June 24.

With regard to the negotiations and bargaining, I place no credence in the assertions of Respondent's witnesses that the Union representative, Segall, had agreed to a deadline of June 24 at 5 p.m., at which point an agreement had to be consummated or else he would "walk away." Indeed, on that date the parties had already agreed to an economic package and negotiations were halted only because of Respondent's refusal to go along with any written contract provision for Union visitation to its premises. Interestingly, after the termination of the June 24 meeting, Polinsky informed Tatta of the events and then they both decided to go it non-union. However, by that time it appeared that Respondent could be reasonably assured of enlisting a goodly complement of the Broadway employees it was seeking. Respondent concedes that it heard of this through its supervisors who had contact in the field with these employees. Moreover, at the conclusion of the meeting on June 24, Meyer, the employee representative at the meeting asked Quinn whether he could obtain employment with Respondent and Quinn assured him that he could and indeed the economic package already agreed upon with the Union would be implemented. Obviously this was passed on to other employees.

Despite this, Respondent meet again with the Union on July 1 and July 8. By this time however, Atlantic was already in operation with the Broadway employees. At that point, Respondent offered to resume negotiations with the Union but only on the basis of the Teleprompter contract as a starting point. Since the Union had already negotiated an economic package that was better than the Teleprompter agreement, and the employees it represented were already working on the basis of that negotiated package, it is not difficult to see why the Union could

not agree on that basis. Finally it should be noted that at all time during the course of negotiations, the Union made it clear to the Broadway employees that they should protect themselves by seeking employment with Respondent even though a collective-bargaining-agreement was not forthcoming. Presumably, as witness the conversation between Meyer and Quinn just related above, Respondent was aware of this and could risk its non-union decision.

Accordingly, I find that Respondent recognized and bargained with the Union on July 1 and 8 and violated Section 8(a)(5) of the Act by reason of its unlawful withdrawal of recognition of the Union thereafter and refusal to bargain with the Union as the majority representative of the employees in the unit found appropriate.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in Section III, above, occurring in connection with the operations of Respondent described in Section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

V. Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent as a successor employer, violated Section 8(a)(5) and (1) of the Act, by failing and refusing to bargain with the Union as the collective-bargaining-representative of the employees in the unit found appropriate herein, and moreover that Respondent unlawfully withdrew recognition of the Union after having recognized and bargaining

with it, I recommend that Respondent be ordered to recognize and bargain in good faith with the Union.

Conclusions of Law

1. Respondents, Cablevision and Atlantic, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act, by refusing to bargain after June 24 and again after July 8, 1977, collectively in good faith with the Union as the exclusive bargaining representative of the employees in the unit found appropriate herein.

4. The Union has been, and continues to be the collective-bargaining-representative of a majority of the employees in the following appropriate bargaining unit: all technicians, head end technicians, technician foremen, installation employees, installation foremen, construction employees, construction foremen, laboratory and converter technicians and property damage employees employed by Respondent Atlantic at its Hicksville, New York location, excluding all managerial employees, business office clerical employees, service representatives, programming employees, warehousemen, guards and all supervisors as defined in the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(5) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[14]

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[14]In the event no exceptions are filed as provided by Section 102-46 of the Rule and Regulations of the National Labor Relations Board, the findings conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondents, Cablevision Systems Development Company and Atlantic Cable Television Services Corp., their partners, officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with respect to wages, hours, and other terms and conditions of employment with Local 25, International Brotherhood of Electrical Workers, AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate unit: all technicians, head end technicians, technician foremen, installation employees, installation foremen, construction employees, construction foremen, laboratory and converter technicians and property damage employees employed by Respondent Atlantic at its Hicksville, New York location, excluding all managerial employees, business office clerical employees, service representatives, programming employees, warehousemen, guards and all supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named Union as the exclusive representative of the employees in the unit defined above with respect to wages, hours, and other terms and conditions of employment, and, if agreement is reached, embody it in a signed contract.

(b) Post at their facilities in Hicksville and Jericho, New York, copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Di-

[15]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

rector for Region 29, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. April 15, 1980.

Julius Cohn
Administrative Law Judge

FILED

OCT 30 '98

ALEXANDER L. STEVAS
CLERK

No. 98-31

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CABLEVISION SYSTEMS DEVELOPMENT COMPANY
AND
CABLE TELEVISION SERVICES CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

AND

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS LOCAL UNION 25,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 25 IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-81

CABLEVISION SYSTEMS DEVELOPMENT COMPANY
AND
ATLANTIC CABLE TELEVISION SERVICES CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

AND

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 25,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 25 IN OPPOSITION

QUESTION PRESENTED

Whether a cable television company which had previously subcontracted two of its many services, and

which subsequently terminated the subcontracting relationship and hired the subcontractor's employees, can be deemed a successor to the subcontractor under the National Labor Relations Act, when the operations, insofar as they affect the employees, are essentially the same after being taken over by the cable television company.

ARGUMENT

NO CONFLICT EXISTS BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE DECISION OF THIS COURT IN *NLRB v. BURNS INTERNATIONAL SECURITY SERVICES, INC.*, 406 U.S. 272 (1972)

The Petitioner argues that the decision of the United States Court of Appeals for the Second Circuit is inconsistent with this Court's decision in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), and with decisions of other appellate courts, because the Second Circuit "overlooked the critical successorship requirement emphasized by this Court in *Burns*, that both firms operate in the same industry." (Pet. 5) This argument fails for two reasons: First, as a factual matter, in this case both the successor and predecessor employers were in the same industry. Second, as a legal matter, this Court in *Burns* did not establish a requirement that both firms operate in the same industry.

A. As the NLRB and the Second Circuit found, Cablevision is a company engaged in the development, maintenance and operation of cable television. (Pet. 4a-5a, 12a) Cablevision subcontracted certain installation and maintenance functions to Broadway Maintenance Corporation and later formed Atlantic Cable Television

Services to take over the operations performed by Broadway. (Pet. 5a) Thus both Cablevision, Atlantic and Broadway were operating in the cable television industry, and Atlantic was engaged in precisely the same business as Broadway.

Moreover, as the Second Circuit noted, "the relevant comparison is not between Cablevision and Broadway on a total basis, but between the specific operations involving the union members." (Pet. 7a) In this case, the Petitioner does not dispute the Second Circuit's finding that "the operation, insofar as it affect[ed] the union members . . . was essentially the same after Cablevision took it over as it had been under Broadway." (Pet. 7a)

B. Although petition refers generally to *Burns* for the proposition that a predecessor and successor must operate in the same industry, *Burns* does not establish such a requirement. In *Burns* this Court stated,

> [W]here the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union.

406 U.S. at 281. Thus *Burns* refers not to the identity of the industry in which the predecessor and successor are engaged but to the similarity of the bargaining unit before and after a change of employers. In the instant case the bargaining unit was not changed by a change of employers, and Petitioner does contend that the unit was changed.

Although the Petitioner suggests that a conflict exists between the decision of the Second Circuit and the decisions of other courts, no such conflict exists. In

Machinists v. NLRB, 414 F.2d 1135 (D.C. Cir. 1969), cited by Petitioner, the Board and the D.C. Circuit concluded that two employers were not successors because of a "substantial nondiscriminatory change in personnel" and because the operations as they affected the employees were "significantly altered." *Id.* at 1138. And, the D.C. Circuit subsequently held that the "essential inquiry is whether operations, as they impinge on union members, remain essentially the same after the transfer." *Electrical Radio and Machine Workers v. NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979).

In *NLRB v. Middleboro Fire Apparatus, Inc.*, 590 F.2d 4 (1st Cir. 1978), also cited by Petitioner, the First Circuit concluded that one employer was the successor of another because the employer performed the same services on the same premises, using the same tools, equipment and employees, who exercised the same skills. And in *NLRB v. Alamo White Truck Service*, 273 F.2d 238 (5th Cir. 1959), the court held that one employer was not the successor of another because of "the difference in policies, operations, personnel and employer-employee relationship." *Id.* at 242.

Thus the "critical successorship requirement" (Pet. 5) is not, and has never been, that both firms operate in the same industry and no conflict, therefore, exists between the decision of the Second Circuit and this Court's decision in *Burns*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 20, 1982

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No. 82-61

In the Supreme Court of the United States

OCTOBER TERM, 1982

CABLEVISION SYSTEMS DEVELOPMENT COMPANY AND ATLANTIC CABLE TELEVISION SERVICES CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that an employer that recaptured work previously done by a subcontractor was a successor-employer where it hired the subcontractor's employees and the bargaining unit remained unchanged.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-81

CABLEVISION SYSTEMS DEVELOPMENT COMPANY AND ATLANTIC CABLE TELEVISION SERVICES CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-7a) is reported at 671 F.2d 737. The decision and order of the National Labor Relations Board (Pet. App. 8a-9a) are reported at 251 N.L.R.B. 1319.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1982. A petition for rehearing was denied on April 19, 1982 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2.

STATEMENT

1. Petitioner Cablevision operates a cable television service in New York and New Jersey. Prior to July 1977, Cablevision subcontracted the installation of cables and receiver units at its Long Island customers' premises and the maintenance of that equipment to Broadway Maintenance Corp. (Broadway) (Pet. App 12a). Broadway's maintenance and installation employees were represented by respondent International Brotherhood of Electrical Workers Local 25 (the Union) (*id.* at 13a).

On June 30, 1977, Cablevision terminated its contract with Broadway and, on July 1, began performing the previously subcontracted installation and maintenance functions through a wholly-owned subsidiary, petitioner Atlantic Cable Television Services[1] (Pet. App. 13a, 14a). Forty-eight of the 53 employees employed by Cablevision to perform the previously contracted work had been employed by Broadway (*id.* at 20a). They performed the same work for Cablevision as they had for Broadway with no hiatus in their employment (*ibid.*).

The Union requested that Cablevision bargain with it on behalf of the installation and maintenance employees. Negotiations between Cablevision and the Union were held, but they broke down and Cablevision refused to meet further, contending that it had no obligation to bargain with the Union. Pet. App. 5a, 30a-33a.

---

[1] The Board found (Pet. App. 12a) Cablevision and Atlantic to be a single integrated employer, a finding admitted by petitioners. Both petitioners are referred to herein as Cablevision.

2. The Board found that Cablevision violated Sections 8(a)(5) and 8(a)(1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union as the representative of the installation and maintenance employees. In reaching this conclusion, the Board found that Cablevision was a successor employer of the Broadway employees and therefore was obligated to bargain with the Broadway employees' bargaining representative (Pet. App. 30a).[2] The Board relied on the facts that Cablevision "has recaptured from its subcontractor the functions of installation and servicing of its cable television business. There was no hiatus whatsoever * * *. The employees taken over from Broadway continued to do the same work that they had been doing before, and were supervised by the same supervisors" (Pet. App. 29a).[3]

3. The court of appeals agreed with the Board that Cablevision was Broadway's successor, observing that (Pet. App. 6a):

> It is difficult to imagine a clearer case of the application of the successorship doctrine than the present one, where the change of employer represents merely a recapture of an operation previously performed by an independent contractor. The great bulk of Atlantic's employees was carried over

[2] Alternatively, the Board held that Cablevision recognized the Union voluntarily when it engaged in negotiations and then unlawfully withdrew recognition (Pet. App. 33a). The court of appeals did not reach this alternative holding and no issue regarding it is raised here.

[3] The Board rejected the contention that Cablevision cross-trained the employees to perform a greater variety of work than they had performed at Broadway, noting that initially the employees performed exactly the same work as at Broadway and their subsequent training involved "additional duties [that] were not essentially different [nor] required a greater knowledge or different skills" (Pet. App. 29a-30a).

from Broadway, and the former Broadway employees continued to perform basically the same work as before.

The court rejected Cablevision's contention that the successorship doctrine established in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 278-279 (1972), should not be applied here because Broadway and Cablevision were not in the same business. In this regard, the court explained that "the relevant comparison is not between Cablevision and Broadway on a total basis, but between the specific operations involving the union members" (Pet. App. 7a).

ARGUMENT

In *NLRB* v. *Burns International Security Services, Inc.*, *supra*, this Court held (406 U.S. at 281) that where, after a new employer takes over an operation from a predecessor employer, "the bargaining unit remains unchanged and a majority of the employees hired by the new employer" have been represented by a union, the new employer is obligated to bargain with that union. Cablevision does not dispute that the bargaining unit here remained the same or that it hired a majority of the predecessor's employees. Rather, it maintains that it should not be deemed a successor-employer solely because its predecessor performed only service and maintenance cable television functions while it offers an integrated cable service. There is no merit to that contention.

The fact that Cablevision performs an integrated service while Broadway performed a limited service[4] is relevant to determining whether Cablevision is a suc-

[4] Cablevision's assertion (Pet. 6) that it and Broadway operate in different industries is not accurate: both operated in the cable industry; Broadway, however, operated in that industry in a more limited capacity than Cablevision does.

cessor to Broadway. However, as the court of appeals correctly noted (Pet. App. 7a), the relevance is to "whether operations, as they impinge on union members, remain essentially the same after the transfer to the new employer." Accord: *International Union of Electrical, Radio & Machine Workers* v. *NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979). In other words, where the change from a limited to an integrated operation causes alterations in the bargaining unit so that the new bargaining unit may no longer be an appropriate one, successorship status will not be found. *NLRB* v. *Burns International Security Services, Inc.*, *supra*, 406 U.S. at 280. Here, the fact that Cablevision is an integrated operation had no impact on the bargaining unit. The bargaining unit employees were not integrated into any other Cablevision operation but were maintained as a separate unit doing the same work under the same supervision. In those circumstances, the fact that Cablevision engages in other operations besides installation and maintenance does not preclude a finding of successorship.

The cases relied on by Cablevision (Pet. 5-6) stand for no different proposition. In *NLRB* v. *Middleboro Fire Apparatus, Inc.*, 590 F.2d 4, 6-7 (1st Cir. 1978), the predecessor employer manufactured firefighting apparatus and also operated a service department. The successor-employer took over only the service department. Despite this change from an integrated operation to a limited one, the court found (*id.* at 8-9) that the new employer was a successor as defined by *Burns*. The only difference between that case and this one is that there the successor rather than the predecessor carried on the more limited operations. In neither case does the change in scope of operation control on the question of successorship status.

In *NLRB* v. *Bausch & Lomb, Inc.*, 526 F.2d 817, 825-826 (2d Cir. 1975), the court rejected a finding that an employer who purchased a building was a successor

to the previous owner's bargaining obligation to the union representing its four boiler room employees. The court asserted that because the new owner operated a "completely different business" it was "unclear" whether the boiler room employees constituted an appropriate unit or should properly be placed in either a multiplant or a wider production unit. No such impact on the appropriateness of the bargaining unit was shown to have occurred here as a result of Cablevision's status as an integrated operation.

Similarly, in *International Association of Machinists, District Lodge 94* v. *NLRB*, 414 F.2d 1135 (D.C. Cir. 1969) (IAM), the court agreed with the Board that two new employers who purchased automobile dealerships from General Motors did not succeed to the latter's bargaining obligation with the unions that represented certain of its employees in a single unit covering the two dealerships. The court found (*id.* at 1137-1138) that a single unit was no longer appropriate after the sale to the two employers who were competitors.[5]

The decision in *NLRB* v. *Alamo White Truck Service*, 273 F.2d 238 (5th Cir. 1959) also preceded *Burns*. There the Court found that changes in organizational structure occasioned by a change in ownership from a large national concern to a small local concern resulted in changes in the relationship between management and the bargaining unit (*id.* at 242). No such changes were shown here. Moreover, in *Alamo* the court also relied on the fact that none of the new employer's unit employees belonged to the union (*id.* at 241).

---

[5] Moreover, the new employers in *IAM* did not hire a majority of the predecessor's employees (*id.* at 1137). *IAM* was decided prior to *Burns*, and that factor was not considered dispositive by the Board or the court (*id.* at 1138).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1982